

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact:

Telephone Number:

Refer Reply To:
CC:TEGE:EB:QP2
PLR-111236-11
Date:
September 13, 2011

TY:

X =

Amount Y =

Plan =

State S =

Dear :

This is in response to a letter of March 11, 2011, and subsequent correspondence submitted on your behalf by your authorized representatives, requesting a ruling regarding a deferred compensation plan (the "Plan") established by X, an organization exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code. You request a ruling providing that certain amendments to the Plan do not cause amounts deferred under the Plan to be subject to section 457 of the Internal Revenue Code, as amended by section 1107 of the Tax Reform Act of 1986 (the "Act").

X is a non-profit corporation organized under the laws of State S. The Plan was originally adopted effective March 14, 1982, amended and restated on April 10, 1987, and again on January 1, 1996. The Plan was also amended in December 2010 to comply with the requirements of section 409A.

Under the plan, upon retirement, a participant receives a monthly benefit equal to 80% of a participant's average monthly compensation reduced, in part, by the participant's social security and pension benefits.

X proposes to amend the Plan to limit the amount of benefits that a participant can receive under the Plan. The Plan will state that the monthly benefit payable under the Plan can not exceed the greater of Amount Y or the normal monthly benefit payable to the participant assuming he or she was age 55 at his or her employment termination.

Section 1107(c)(3)(A) of the Act amended the Code to provide that, generally, section 457 of the Code is applicable to a deferred compensation plan established and maintained by organizations exempt from tax for taxable years beginning after December 31, 1986. Section 1107(c)(3)(B)(ii) of the Act provides that section 457 does not apply to amounts deferred under a plan that are deferred for taxable years beginning after December 31, 1986, pursuant to an agreement that was in writing on August 16, 1986, and on such date provides for a deferral for each taxable year covered by the agreement of a fixed amount or of an amount determined pursuant to a fixed formula.

A-28 of Notice 87-13, 1987-1 C.B. 432, provides, in part, that section 457 of the Code shall not apply to deferrals of compensation that would have been paid or made available (but for the deferred compensation plan) in taxable years of an individual beginning after December 31, 1986, under a deferred compensation plan of a tax-exempt organization to the extent that such deferrals were fixed pursuant to a written plan on August 16, 1986.

A deferral with respect to an individual is treated as fixed on August 16, 1986, to the extent that a written plan on such date provided for such deferral for each taxable year of the plan and such deferral was determinable on such date under written terms of the plan as a fixed dollar amount, a fixed percentage of a fixed base amount (e.g., amount of regular salary, commissions, bonus, or total compensation), or an amount to be determined under a fixed formula. An example of a fixed formula is a deferred compensation plan that is in the nature of a defined benefit plan under which the deferred compensation to be paid to an employee in the future (e.g., on or after separation from service) is in the form of an annual benefit equal to 1 percent of each of the employee's years of service with the employer times the employee's final average salary.

A-28 of Notice 87-13 also provides that a deferral with respect to an individual is treated as fixed on August 16, 1986, to the extent that a written plan on such date provided for such deferral and the deferral is the same as the deferral in effect with respect to such individual under such plan on August 16, 1986, even if on such date the written plan did not fix the amount of deferral. Thus, for example, if under a written plan on August 16, 1986, an employee could elect to have up to 5 percent of regular salary deferred and if,

on August 16, 1986, the employee had a 5 percent deferral election in effect, subsequent deferrals of the employee's regular salary are to be treated as having been fixed on August 16, 1986, for purposes of this grandfather rule for as long as such deferral continues to be 5 percent of the employee's regular salary. Similarly, for example, if, under a specified formula in a written plan on August 16, 1986, an employee earned additional deferred compensation amounts for each year of service with the employer, additional deferred amounts attributable to years of service after December 31, 1986, are to be treated as having been fixed on August 16, 1986, for purposes of this grandfather rule for as long as such deferrals continue to be determined under the formula in effect on August 16, 1986.

An amount of deferral that is pursuant to a written plan on August 16, 1986, will cease to be treated as fixed on such date and thus will be subject to section 457 of the Code, as of the effective date of any modification to the written plan that directly or indirectly alters the fixed dollar amount, the fixed percentage or the fixed base amount to which the percentage is applied, or the fixed formula. Similarly, an amount of deferral that is pursuant to a written plan on August 16, 1986, that is treated as fixed on such date because it is the same deferral amount that was in effect under such plan on August 16, 1986, will cease to be treated as fixed on such date, and thus will be subject to section 457, as of the effective date of any modification to the amount of the deferral (i.e., any modification to the specified dollar amount, specified percentage of a specified base amount, or specified formula, whichever is applicable).

In S. Rep. 100-445, 100th Congress, 2nd Sess. 148 (1988), the Senate Finance Committee of the Technical Corrections Act of 1988 stated that:

The bill clarifies that the grandfather rule applicable to unfunded deferred compensation arrangements of tax-exempt employers applies to all deferred compensation plans of tax-exempt organizations that otherwise meet the requirements of the grandfather rule, without regard to whether the plans would be eligible deferred compensation plans within the meaning of section 457.

The bill also clarified that the grandfather rule only applies to individuals who were covered under the plan and agreement on August 16, 1986. Thus, for example, the grandfather rule does not apply to a new employee hired after August 16, 1986, or an employee who was hired on or before such date, but who was not a participant in the deferred compensation plan until after August 16, 1986.

Based on the information, documents submitted and the authorities cited above, we conclude:

1. The Plan provides for a deferral of compensation that is determined pursuant to a fixed formula within the meaning of section 1107(c)(3)(B)(ii)(II) of the Tax Reform Act of 1986.
2. The reduction in the total benefit resulting from the proposed amendment will not constitute a modification to the "fixed formula" and the adoption of the proposed amendment will not cause the Plan to be subject to the requirements of section 457 of the Code.

No opinion is expressed with regard to the timing of the inclusion in income of amounts deferred under the Plan.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. If the Plan is significantly modified, this ruling will not necessarily remain applicable.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representatives.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,

----- John T. Ricotta -----

John T. Ricotta
Branch Chief, Qualified Plans Branch 2 (Employee
Benefits)
(Tax Exempt & Government Entities)

Enclosure

Copy for section 6110 purposes

cc: